SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Katherine Brooks Harris, Sydney McNeal and Yuqing ("Chelsea") Wei,	:	Index No. 154172/2018
	:	Hon. Doris Ling-Cohan
Plaintiffs,	:	
	:	IAS Part 36
- against -	:	
	:	Motion Sequence No. 004
Charlie Rose Inc., and Charles Peete Rose, Jr. a/k/a Charlie Rose,	:	Oral Argument Requested
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANTS CHARLIE ROSE INC. AND CHARLES PEETE ROSE, JR. A/K/A CHARLIE ROSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases **Page**

Federal Cases **Page**

Statutes, Codes, Rules and Regulations

Bills, Reports, Treatises, Miscellaneous

PRELIMINARY STATEMENT

Plaintiffs Katherine Brooks Harris, Sydney McNeal and Chelsea Yuqing Wei, by counsel, respectfully submit this Memorandum of Law and supporting papers in opposition to Defendants' motion to dismiss the Complaint.[1] This lawsuit is brought under the New York City Human Rights Law and arises from the unlawful sexual harassment by Charlie Rose against Plaintiffs, the unlawful retaliation against them, and unlawful aiding and abetting. Defendants misrepresent the applicable legal standards and rely on inapplicable summary judgment cases for their baseless motion.[2] Plaintiffs' Complaint not only satisfies but exceeds the CPLR's liberal pleading standards. The Court should flatly deny Defendants' baseless motion to dismiss.

A. Background

Charlie Rose is an internationally-known former television host/anchor. Like many powerful media figures and professional performers, Rose was one person on TV but another in real life. As widely reported, when off-camera, Rose sexually harassed multitudes of women in the workplace. For decades Rose was never held accountable for his unlawful and degrading treatment of women at Rose's company (Charlie Rose Inc.) and at CBS, where he also worked.[3]

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[1] Ms. Wei's legal name is now Chelsea Yuqing Wei. Plaintiffs' supporting papers include three affidavits of Plaintiffs cited as "Harris Aff.," "McNeal Aff." and "Wei Aff." and collectively cited as "Plaintiffs' Affidavits." Those affidavits are properly considered by the Court, with no concession whatsoever and reservation of all rights by Plaintiffs as to Defendants' motion. *Thomas v Grunberg 77 LLC*, 2018 NY Slip Op 32577[U], *11 [Sup Ct, NY County 2018, Doris Ling-Cohan, J.]. References to "Goldberg Aff." are to the Affirmation of Plaintiffs' Counsel filed herewith. A copy of the Complaint ("Compl.") is annexed to the Goldberg Aff. as Exhibit A thereto.

[2] Cites to "Def. Br. __" are to Defendants' brief in support of their motion at NYSCEF Doc. No. 34, at the page number of brief as submitted and not at the page number supplied by the NYSCEF system.

[3] In the Complaint, Plaintiffs allege, among other items, that CBS discriminated and retaliated against Plaintiffs, which Rose aided and abetted/attempted-to-do-so in violation of N.Y.C. Admin. Code § 8-107[6]. Plaintiffs also allege that CBS and Defendants were Plaintiffs' employers, including joint employers and/or constructive employers; and that Mr. Rose was an employee of CBS and, upon information and belief, an owner, officer and/or employee of Charlie Rose Inc. While CBS is no longer a defendant (NYSCEF #49), its exit from the case is no bar to the remaining Defendants' § 8-107[6] liability. *See Daniels v Wesley Gardens Corp.*, 2011 US Dist LEXIS 45328 at *10-*11 [WD NY Apr. 27, 2011, No. 10-CV-6336T].

Only in November 2017—after the *Washington Post* reported and published Rose's repugnant behavior—did Rose separate from CBS. He responded to reports of his behavior by confessing that "some of the stories were true." (Compl. ¶ 84).

By the Complaint, Plaintiffs tell how Rose repeatedly sexually harassed them and how his unlawful behavior derailed their careers. They seek redress under the New York City Human Rights Law ("NYCHRL") - among the country's farthest-reaching and comprehensive anti-harassment laws - to hold Rose accountable for his unlawful behavior. Instead of Answering the Complaint, Defendants filed a baseless motion to dismiss which essentially attacks not only the nature of Plaintiffs' claims but also statutes and caselaw protecting working women.

B. <u>The Bases of Plaintiffs' Causes Of Action</u>

In 2009, in its landmark *Williams* case, the Appellate Division, First Department recognized that victims of workplace sex harassment often had no redress in Court because they had "not been harassed enough."[4] *Williams* reminded the public that New York City law is even more protective of women than Federal and State law and prohibits "less-well" treatment of employees because of gender. Prohibited treatment includes not only tangible discriminatory conduct (such as firing) but also all less-well verbal or physical conduct of a sexual nature—even isolated, gender-based comments and conduct.[5] Liability can also be imposed for retaliating against those who oppose such discrimination and for aiding/abetting (or attempting to aid/abet)

[4] *Williams v. NYC Hous. Auth.*, 61 AD3d 62, 70-1 [1st Dept 2009], *lv. denied*, 13 NY3d 702 [2009]; *see also Martin v. McGraw Hill Cos., Inc.*, 2010 N.Y. Misc. LEXIS 5021, 2010 NY Slip Op 32867[U] *5 [Sup. Ct., N.Y. County 2010, Doris Ling-Cohan, J.], *quoting Williams*, 61 AD3d 62, 70-1.

[5] *Williams*, 61 AD3d 62, 70-1, 76-7; *Hernandez v Kaisman*, 103 AD3d 106, 115 [1st Dept 2012].

such discrimination and retaliation.[6]

In 2016, the NYCHRL was amended to reemphasize the law's broad standards of liability and damages that protect working women's rights. The amendment codified the Appellate Division, First Department's majority opinion in *Williams* as well as its unanimous *Bennett* opinion, and the opinion of the Court of Appeals in *Albunio.*[7] The 2016 amendments further expressly codified that "gender-based harassment threatens the terms, conditions and privileges of employment."[8] (*See* Argument, Point I).

Here, as a matter of law, the Complaint properly alleges that Defendants including Charlie Rose engaged in repeated acts of sexual harassment, including without limitation sexual touching, sexual comments, sexual advances and demeaning conduct. Charlie Rose's unlawful gender-based adverse treatment of these women occurred both at CBS and at his own company Charlie Rose Inc.

The Complaint presents causes of action for "unlawful discriminatory practices": (i) "in the terms, conditions or privileges of employment"; (ii) in aiding, abetting/attempting to do so with respect to such unlawful practices; (iii) by discriminatory discharge; (iv) by aiding, abetting/attempting to do so with respect to discriminatory discharge; (v) by retaliation; and (vi) by aiding, abetting/attempting to do so with respect to retaliation. NYC Admin Code §§ 8-107[1][a][2]-[3], 8-107[6]-[7]. (Compl.; *see* Argument, Points III, IV). The Complaint

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[6]NYC Admin. Code § 8-107[6], 8-107[7].

[7]NYC Loc. L. 35 [2016], *codifying at* NYC Admin. Code § 8-130 *the majority opinion in Williams*, 61 AD3d 62; *Bennett v. Health Management Systems, Inc.*, 92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; and *Albunio v. City of New York*, 16 NY3d 472 [2011].

[8]NYC Loc. L. 35 (2016), *amending* NYC Admin. Code § 8-101.

provides Defendants with fair notice of Plaintiffs' causes of action and clearly accords with Court decisions flatly denying motions to dismiss under the NYCHRL, including:

* *Schindler v. Plaza Construction LLC*, 154 AD3d 495 [1st Dept 2017] (affirming CPLR 3211 motion denial regarding NYCHRL gender discrimination claims where plaintiff alleged (a) she was falsely criticized before supervisor observed her work, (b) she was harassed and insulted and was replaced by a man, and (c) she was given a false reason for termination);

* *Kassapian v City of NY*, 155 AD3d 851 [2d Dept 2017] (reversing CPLR 3211[a][7] dismissal; plaintiff stated a cause of action under NYCHRL for discrimination based on gender/sex and age, and retaliation, where plaintiff alleged the display of a sex toy);

* *Kaplan v. NYC Dept Of Health and Mental Hygiene*, 142 AD3d 1050 [1st Dept 2016] (reversing grant of motion to dismiss as to sexual harassment and retaliation, where female plaintiff alleged that male supervisor rubbed his hand back and forth over his groin and inner thigh while making grunting noises);

* *Vig v. New York Hairspray Co., L.P.*, 67 AD3d 140, 144-45 [1st Dept 2009] (plaintiff stated claim for NYCHRL discrimination by simply alleging membership in a protected class and termination because of such membership; reversing lower court's erroneous CPLR 3211[a][7] holding that "plaintiff failed to state a prima facie claim...offering only conclusory allegations and failing to plead a causal link between his disability and his termination");

* *Martin v. McGraw Hill Cos., Inc.*, 2010 N.Y. Misc. LEXIS 5021, 2010 NY Slip Op 32867[U] *5 [Sup. Ct., N.Y. County 2010, Doris Ling-Cohan, J.] (denying motion to dismiss allegations of "inappropriate remarks and inquiries into [plaintiffs'] sex life"); and

* *Pryor v. Jaffe & Asher, LLP*, 992 F Supp 2d 252 [SD NY 2014, Katherine Polk Failla, D.J.] (rejecting motion to dismiss a complaint that alleged "a male supervisor asked a female employee out to a bar, stroked her hand in a sexual manner, and twice attempted (and once succeeded) to kiss her on the neck.").

Likewise, the Complaint gives Defendants fair notice of Plaintiffs' retaliation causes of action, consistent with Court decisions applying the correct standards and holding that a plaintiff stated a cause of action for retaliation. Under the NYCHRL, actionable retaliatory conduct

broadly includes verbal abuse, unjustified criticisms of job performance, threats and discharge. "Opposition" under the NYCHRL is simply the making clear of one's disapproval of the harasser's discriminatory conduct by communicating "in substance" the thought that the harasser's treatment was wrong.[9] Finally, the Complaint provides fair notice to Defendants of Plaintiffs' aiding/abetting-attempting causes of action. (Compl.; *see* Argument, Points IV, V).

C. Defendants Have Utterly Failed In Their Burden

"In the day-to-day frontlines of litigation," a sitting judge recently writes, motions to dismiss "tend to be overused, misused, or abused."[10] Here, Defendants have utterly failed to meet their motion burden while mis-stating—or avoiding altogether— binding precedent. By contrast, Plaintiffs have given fair notice of their causes of action in accordance with the liberal pleading standards of CPLR 3013/3026. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (Court must "accord plaintiffs the benefit of every possible favorable inference"). Plaintiffs' Complaint also accords with the particularly relaxed pleading standards applicable to employment discrimination claims, which standards Defendants ignore. *See Vig*, 67 AD3d 140, 145 (employment discrimination plaintiff need not plead specific facts). Plaintiffs not only meet, but exceed, the liberal standards. Defendants' motion should be flatly denied. (*See* Argument, Point II).

D. Overview Of Defendants' Baseless Arguments

As more fully set forth below, Defendants' motion is littered with baseless arguments. Defendants erroneously argue that the Complaint fails to allege that Rose's conduct against

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[9] *Albunio*, 16 N.Y.3d 472, 479, *codified at* NYC Admin. Code § 8-130.

[10] Hon. Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of Twombly/Iqbal*, 40 Cardozo L. Rev. 1, 5 [2018].

Plaintiffs was based on gender. As U.S. District Judge Nina Gershon recently stated, such an argument "does not merit serious discussion."[11] Plaintiffs have alleged that Rose's conduct was gender-based and the allegations are *precisely* the type of unwelcome, sex-based conduct the law prohibits. Defendants argue that the Complaint fails to allege that Rose's conduct altered the "terms, conditions or privileges" of Plaintiffs' employment, an argument that is blatantly contrary not only to the caselaw but also to the statute itself: NYC Admin Code § 8-101 reads in part "gender-based harassment threatens the terms, conditions and privileges of employment." Rose argues that his conduct was nothing more than "routine workplace interaction." To the contrary, Rose's harassment was a *per se* unlawful discriminatory practice in violation of the NYCHRL and it was *routine* for Rose to unlawfully sexually harass women. Any argument by Rose as to the severity of his unlawful conduct is irrelevant to a motion to dismiss and inapplicable to liability. At best, such assertions may be a matter for the jury to consider in awarding damages.[12]

To bolster their spurious arguments, Defendants erroneously rely on summary judgment decisions and Federal pleading standards, all of which are inapplicable. They ignore the 2016 amendments to the NYCHRL that among other items codify the majority opinion in *Williams*, as

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[11] *Batten v Global Contact Servs., LLC*, 2018 US Dist LEXIS 105327, at *15, n 2 [ED NY June 21, 2018, No. 15-CV-2382 Nina Gershon, D.J.]; *see also Pryor*, 992 F Supp 2d 252, 261 (rejecting motion to dismiss, stating: "Any reasonable observer, if asked what motivated this encounter, would almost certainly answer that the male supervisor's actions were prompted by the female employee's gender, not by her interest in collecting stamps or her affection for a particular sports team. Courts have even found that the NYCHRL's requirement of discrimination 'because of' gender can be satisfied by allegations of entirely non-physical work interactions with sexual content or undertones.").

[12] *Kaplan*, 142 AD3d 1050, 1051 ("a contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense...which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss....A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action."); *Williams*, 61AD3d 62, 76 ("questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability.").

well as *Bennett* and *Albunio*. NYC Admin. Code § 8-130[c]. Plaintiffs' pleading exceeds the applicable standards, and even if Defendants could identify a defect, they ignore the law requiring that defects in a Complaint "shall be ignored if a substantial right of a party is not prejudiced."[13] Here there clearly is no prejudice. That Defendants understand the claims asserted is shown by the very arguments raised in the motion. Defendants would have the Court close the door to workplace gender equality in the City. The Court should deny Defendants' motion, so that they must answer the Complaint under the NYCHRL— the law that is "maximally protective [] in all circumstances,"[14] that provides the "broadest vision of social justice with the strongest law enforcement deterrent,"[15] and that protects not only women against unlawful discrimination but also the "foundation of a free democratic state."[16] (*See* Argument, Point I).

STATEMENT OF FACTS[17]

A. CBS And Rose

For decades, Charlie Rose was a journalist and celebrity morning host at CBS, one-time anchor of its evening news program, correspondent for *60 Minutes*, and a host of *CBS This Morning*. Rose was also a talk show host for his eponymous show produced by his company, Defendant Charlie Rose Inc. ("CRI"). As widely reported, when off-camera, Rose sexually harassed multitudes of women in the workplace. For decades Rose was never held accountable

[13] *Catli v. Lindenman*, 40 AD2d 714, 715 [2d Dept 1972], *aff'd* 33 N.Y.2d 1002 [1974]; CPLR 3026.

[14] NYC Loc. L. No. 35 [2016], § 1, *codified at* NYC Admin. Code § 8-130.

[15] *Williams*, 61 AD3d 62, 69 (citation omitted).

[16] Gender discrimination and sexual harassment "threaten the rights and proper privileges" of New York City's inhabitants and "menace the institutions and foundation of a free democratic state." NYC Admin. Code § 8-101.

[17] This Statement of Facts is cited herein as "SOF."

for his unlawful and degrading treatment of women at Rose's company (Charlie Rose Inc.) and at CBS, where he also worked. (Compl. ¶¶ 22-36).

B. Plaintiffs

In 2016, Plaintiff Harris, in her early 20s, joined CBS as a Broadcast Associate for *CBS This Morning*, at CBS Studios. Mr. Rose, then a co-anchor on *CBS This Morning*, stared at Ms. Harris, approached her, and said that he had heard that she was smart and had talked to CBS Executive Producer Ryan Kadro about her. Mr. Rose then began taking her to lunch at expensive restaurants, where he bought her wine and floated job opportunities at *60 Minutes* and at his Defendants' PBS show. During those meals, Mr. Rose sexually harassed Ms. Harris. In April 2017, Charlie Rose issued an offer letter to Ms. Harris and CBS told Ms. Harris to accept the offer. From April-November 2017, Ms. Harris worked as an Associate Producer for Defendants. (Compl. ¶¶ 37-49).

In or about April 2017, Plaintiff McNeal, in her early 20s, joined Rose as an Executive Assistant, a position based in Manhattan. From April-November 2017, Ms. McNeal worked as an Executive Assistant for Defendants. (Compl. ¶¶ 50-52).

In September 2015, Plaintiff Wei, in her early 20s, joined CBS, as a News Associate for *CBS This Morning*, at CBS Studios. Beginning in or about January 2017, CBS by Mr. Kadro directed Ms. Wei to support Mr. Rose, then a co-anchor on *CBS This Morning* and also host of his own television talk show. On or about May 10, 2017, Mr. Kadro reassigned Ms. Wei to report directly to Mr. Rose. Mr. Kadro knew that Mr. Rose had a history of sexual harassment, but did not warn Ms. Wei of it. Ms. Wei worked through November 2017 as a Broadcast Associate (a/k/a Anchor Assistant), reporting to Mr. Rose. (Compl. ¶¶ 53-61).

C. Examples Of Discrimination Based on Gender And Sexual Harassment

As noted above, at various times in 2017 through and including November 2017, Plaintiffs, all in their early 20s, all interacted with and/or reported to Mr. Rose, in his mid-70s. Due to their assigned positions and/or assigned job duties, Plaintiffs were required to spend a substantial amount of time working closely with Mr. Rose and were under his direct control.

Mr. Rose subjected Plaintiffs to repeated, ongoing and unlawful physical and verbal sexual harassment, including without limitation: (a) sexual touching; (b) sexual comments; and (c) sexual advances. There are numerous examples of Rose's conduct in the Complaint:

* Mr. Rose advising Ms. Harris and Ms. McNeal that they were hired because he likes "tall women," i.e., he was attracted to them.

* Mr. Rose repeatedly sexually touching Plaintiffs, including without limitation caressing and touching their arms, shoulders, waist and back, pulling them close to his body, and kissing them on the cheek.

* Mr. Rose repeatedly requiring Ms. Harris to have lunch and/or dinner with him and, during those occasions, Mr. Rose sexually touching Ms. Harris, including placing his hands on her thigh and kissing her cheek. He pointed at other women and called them prostitutes.

* Mr. Rose requiring Ms. McNeal to join him and Ms. Harris for dinner and Mr. Rose sexually touching Ms. McNeal, including placing his hands on her thigh and kissing her cheek.

* Mr. Rose repeatedly asking Ms. Harris and Ms. McNeal about their sex lives and directing them to share details with him.

* Mr. Rose repeatedly boasting of his sexual conquests.

* Mr. Rose suggesting to Ms. Harris and Ms. McNeal that they have sex with each other and telling them words to the effect of, "You just need to become lovers already," indicating that he was having sexual fantasies about them.

* Mr. Rose ordering Ms. Harris and Ms. McNeal to visit his home in Bellport, NY, allegedly for an errand and telling them "I better not hear any stories about two

young women swimming naked together" in his swimming pool—indicating that he was having sexual fantasies about them.

* Mr. Rose referring to Ms. Wei as "China Doll," a fetish term.

* Mr. Rose caressing Ms. Wei's arms when she handed him papers and would say "I love the way you do that."

* Mr. Rose whispering in Ms. Wei's ear, in a sexual manner, "Happy Birthday Dear."

* Mr. Rose, while at the CBS Studios, insisting on kissing his three female subordinates, including Ms. Wei, before leaving for a Summer vacation.

* Mr. Rose demanding that Ms. Harris to come to his apartment late at night.

The unlawful conduct occurred during business hours, at CBS Studios, at Charlie Rose Studios, and offsite. (Compl. ¶¶ 62-68).

The above examples are merely the tip of the iceberg. As further detailed in Plaintiffs' Affidavits, Rose engaged in continuous physical sexual harassment of Plaintiffs in the form of touching, squeezing, pulling, holding, grabbing, pressing down, hugging and kissing. He also made other inappropriate sexual remarks to Plaintiffs. On multiple occasions Rose directed Ms. Harris to sit on a workplace bench next to him and then slid his hand under her buttocks. Rose also undressed in front of Plaintiffs Harris and McNeal. (Plaintiffs' Affidavits, Point A).

D. Examples Of Protected Activities

The Complaint properly alleges that Plaintiffs engaged in protected activities and Plaintiffs have supplemented such allegations by affidavits. Plaintiffs opposed, objected to and/or complained about Charlie Rose's conduct and made clear to Defendants and CBS that his conduct was wrong, unwelcome and offensive. For example, when possible, during Rose's sexual harassment, Plaintiffs communicated their disapproval by, among other acts, rolling their

eyes, looking at Rose with disapproval, saying “Charlie” in a tone of disapproval, changing the subject, changing their physical stance, and/or attempting to move away from Rose. Rose knew or should have known from Plaintiffs’ reactions that they disapproved of his conduct. For example, Plaintiff Harris complained about Charlie Rose's conduct to Yvette Vega, Executive Producer of the Charlie Rose Show. Vega failed to take any remedial action and simply told Plaintiffs words to the effect of "that's Charlie being Charlie." Ms. Wei also complained to CBS about Rose. (Compl. ¶¶ 67-72; Plaintiffs’ Affidavits, Point B).

E. Examples Of Retaliation Including Threats Of Termination

Defendants also unlawfully retaliated against Plaintiffs, subsequent to and close in time to their protected activities, which activities included, without limitation, communicating their disapproval of Rose’s conduct. For example, Rose subjected Plaintiffs to negative treatment, continued to sexually harass Plaintiffs, threatened to fire Plaintiffs, intimidated them and/or verbally abused them as part of his retaliation against them. A few examples of Mr. Rose's comments include: (a) Mr. Rose told Ms. Harris that she lacked skills and talent and "I didn't know that I hired a fucking kindergartner"; (b) Mr. Rose told Ms. McNeal "you can't be a fucking idiot and have this job"; (c) Mr. Rose told Ms. Wei she was a "fucking idiot" for booking a flight on a plane that did not have flat folding seats, when Ms. Wei had previously advised Mr. Rose of same before booking the flight; and (d) Mr. Rose told Harris word to the effect of she “wasn’t the girl he thought I was" and “didn’t seem to care about my job.” (Compl. ¶¶ 73-77; Plaintiffs’ Affidavits, Point B).

F. November 2017 *Washington Post* Article, Termination And Retaliation

On or about November 20, 2017, the *Washington Post* published an article reporting on

Mr. Rose's unlawful sexual harassment. Rose went into "damage control": he held a staff meeting and *admitted* that he sexually harassed female employees, stating among other items, words to the effect of "some of the stories are true." Rose also stated on Twitter that he had engaged in "inappropriate behavior" toward women. However, Rose's *mea culpa* was a public relations stunt. In reality, Rose actually feels no remorse for his patently unlawful conduct towards Plaintiffs and other women. Defendants terminated the employment of Ms. Harris and Ms. McNeal and, after this lawsuit was filed, falsely alleged that Plaintiffs are seeking to exploit the "#MeToo" movement. (*See* Def. Br. 1). Rather than accept responsibility for his unlawful conduct and long history of sexual harassment, Rose seeks to paint himself as the victim. Plaintiffs intend to move forward with discovery and bring this matter to jury trial. (Compl. ¶¶ 78-94; *see* Def Br. at 1).

ARGUMENT

I. THE NYCHRL IS MAXIMALLY PROTECTIVE OF HUMAN RIGHTS

Gender discrimination and sexual harassment "threaten the rights and proper privileges" of New York City's inhabitants and "menace the institutions and foundation of a free democratic state." NYC Admin. Code § 8-101. To prevent such harms, and to remedy them when they arise, the New York City Human Rights Law broadly prohibits gender discrimination and retaliation in the workplace, and aiding/abetting and attempting to aid/abet same. *Id*., §§ 8-107[1][a], [7], [6]. It is "one of the most expansive and comprehensive human rights laws in the nation." Comm Rep of the Govt'l Affairs Div, Comm on Gen Welfare, Comm of Civ Rts, on Proposed Int. No. 814-A [2016], at 5 ("2016 Amendment Report"). (Goldberg Aff., Exh. B). The right to work in New York City free of gender-based discrimination is a *human right*. *Id*.;

see also Rep Comm on Gen Welfare, Prop. Int. No. 22-A [2005] (discrimination inflicts serious harm "to both the persons directly involved and the social fabric of the city as a whole"). (Goldberg Aff., Exh. C).

A. Discrimination Must Play No Role in Employment Decisions

The New York City Human Rights Law mandates that "discrimination shall play *no* role in decisions relating to employment." *Williams*, 61 AD3d 62, 76 (emphasis in original). It is "maximally protective [] in all circumstances," NYC Loc. L. No. 35 [2016], § 1, *codified at* NYC Admin. Code § 8-130, and provides the "broadest vision of social justice with the strongest law enforcement deterrent.'" *Williams*, 61 AD3d 62, 69 (citation omitted). This maximalist approach means "*all* provisions of the City HRL require[] independent construction to accomplish the law's uniquely broad purposes," independent of Federal and State law. *Id*., 61 AD3d 62, 67 (italics in original); NYC Admin. Code § 8-130[a]. Indeed, the NYCHRL prohibits discrimination otherwise permitted by Federal and State law. *Id.*, 61 AD3d 62, 77-78. In 2005 and again in 2016, the City Council amended the NYCHRL to re-emphasize its uniquely broad, liberal and maximalist standards. NYC Loc. L. No. 85 [2005]; NYC Loc. L. No. 35 [2016], § 1, *amending inter alia* NYC Admin Code § 8-130 (codifying *Albunio*, *Bennett*, and the majority opinion in *Williams*); *see also* Goldberg Aff., Exh. D. Even before the 2016 amendments to the NYCHRL, this Court emphatically stated the broad and liberal reach of the NYCHRL:

> "It should be noted that courts recognize that the complaints of women who have been sexually harassed are routinely dismissed *because courts often apply the 'federal standard that they have not been harassed enough*'.... However, the City Human Rights Law affords more latitude than its federal and state counterparts and thus allows such claims as these to survive dismissal....Generally, it is for the trier of fact in harassment cases to determine whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other

employees because of her gender."

Martin, 2010 NY Slip Op 32867[U], *5 [Doris Ling-Cohan, J.] (denying motion to dismiss as to various claims) (citations omitted, emphasis supplied). Based on the statutory text including the codified judicial interpretations at § 8-130, the NYCHRL:

* applies its liberal construction in all circumstances (*Bennett*, 92 AD3d 29, 34)

* in every case and with respect to every issue (2016 Amendment Report at 8-9, 13)

* "broadly in favor of discrimination plaintiffs" (*Albunio*, 16 NY3d 472, 477-478)

* in a way that its maximally protective of civil rights in all circumstances (NYC Loc. L. No. 35 [2005], § 1; 2016 Amendment Report at 11, *quoting Williams*, 61 AD3d 62, 68)

* and accords with legislative intent, "the great and controlling principle" of NYCHRL construction (*Bennett*, 92 AD3d 29, notes 2, 4)

* to "'meld the broadest vision of social justice with the strongest law enforcement deterrent'" (*id*.)

* and prohibits Courts from "substituting their own more conservative social policy judgments for the policy judgments made by the [City] Council" (*Williams*, 61 AD3d 62, n. 28).

B. <u>Discrimination Liability Is Broadly Imposed For "Less Well" Treatment</u>

Under the NYCHRL, "gender-based harassment threatens the terms, conditions and privileges of employment." NYC Admin Code § 8-101. It is unlawful for any covered person to be treated "less well" based on her protected class. *Williams*, 61 AD3d 62, 78. The NYCHRL is not limited solely to "tangible" conduct such as hiring and firing but also includes intangible treatment that is "less well" unwelcome verbal or physical conduct of a sexual nature—including gender-based comments. Liability may arise from a single, isolated incident and not only from severe or pervasive conduct. *Id.*, 61 AD3d 62, 70-1, 76-7, 80, n. 30. For example, the Appellate

Division, First Department reversed a grant of summary judgment on an NYCHRL gender discrimination claim "even if [incidents were] isolated," noting that "defendant took a perverse pleasure in demeaning and embarrassing his female employees" and made comments/emails "objectifying women's bodies and exposing them to sexual ridicule." *Hernandez*, 103 AD3d 106, 115.

C. Retaliation Liability Is Broadly Imposed For "Likely-to-Deter" Conduct

Like the NYCHRL's anti-discrimination provision, the statute's anti-retaliation provision also takes a maximalist approach. Under the NYCHRL, unlawful retaliation includes any act that is "reasonably likely to deter a person from engaging in protected activity." NYC Admin Code § 8-107. Actionable retaliation broadly includes, without limitation, intimidation, verbal abuse, unjustified criticisms of job performance, threats, and termination. *See Williams*, 61 AD3d 62, 71 ("the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable")*; Artis v. Random House, Inc.*, 34 Misc.3d 858, 486-7 [Sup. Ct., N.Y. County 2011] (harassment and threat of transfer constitutes actionable retaliation; denying motion to dismiss such claims). Activity protected by NYCHRL from retaliation broadly includes implied opposition, such as a refusal to follow orders, "standing pat" and "passive resistance"—in fact, any activity by which a member of a protected class communicates in substance her disapproval of the unlawful conduct. *Albunio*, 16 NY3d 472, 479.[18]

D. NYCHRL Aiding And Abetting Liability

The broad-reaching aiding and abetting liability provisions of the NYCHRL, like other

[18]*See also EEOC Enforcement Guidance on Retaliation and Related Issues*, No. 915.004 (August 25, 2016) at Part II.A.2.a and 2.e.; *Williams*, 61 AD3d 62, 66 (Federal standard is the "floor below which the City's Human Rights law cannot fall.").

NYCHRL provisions, is even more protective than Federal and State standards and require an independent liberal and favorable-to-plaintiffs construction. NYC Admin Code § 8-130. For example, allegations that parties "excused and acquiesced" in the harassment of a plaintiff state a claim for aiding and abetting under NYC Admin Code § 8-107[6]. *Artis*, 34 Misc 3d 858, 868; *compare Tate v. Rocketball*, 45 F Supp 3d 268, 273 [ED NY 2014] (applying pre-*Williams*, pre-amended § 8-130 standard without regard to mandate requiring independent, liberal construction broadly in favor of plaintiffs to *all* NYCHRL antidiscrimination provisions).

E. NYCHRL Liability Is Imposed On A Broad Scope Of Actors

Liability under the NYCHRL is *not* limited to an "employer" and *broadly extends* to a wide scope of actors, including: to an "employer or an employee or agent thereof" that engages in any form of unlawful terms-and-conditions discrimination and discriminatory discharge; to "any person" that engages in unlawful retaliation; to "any person" for aiding and abetting discrimination or retaliation for attempting to do so; and to "joint employers." NYC Admin Code §§ 8-107[1][a], [7], [6]. Defendants, and Rose personally, are liable under the NYCHRL on all such grounds. (*See, e.g.*, Point III.F below; *see also* Compl. ¶ 17).

II. APPLICABLE PLEADING STANDARDS ARE PARTICULARLY RELAXED

A. The CPLR Provides For A Liberal "Notice" Pleading Standard

The CPLR is liberally construed to "secure the just [] determination of every civil judicial proceeding." CPLR 104. It requires mere "notice" pleading providing "the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013. A complaint need only be in "substantial compliance" with CPLR 3013. *Catli*, 40 AD2d 714, 715,

citing Foley v D'Agostino, 21 AD2d 60, 62 [1st Dept 1964].

"Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." CPLR 3026*;* see *Catli*, 40 AD2d 714, 715. Deficiencies in a pleading, if any, may be cured by affidavits and/or amendment. *Thomas,* 2018 NY Slip Op 32577[U], *11; CPLR 3025. "If the defect is such that it does not unreasonably mislead the opponent as to the identity of the transactions sought to be litigated and the nature and elements of the cause of action, it should be ignored." *Infusino v. Pelnik*, 45 Misc. 2d 333, 334 [Sup. Ct., Oneida County 1965].

B. Plaintiffs' Burden Is "*De Minimis*" And Defendants' Burden Is Heavy

Plaintiffs' CPLR 3013/3026 burden on a CPLR 3211[a][7] motion to state a cause of action motion is "*de minimis*." *Brathwaite v. Frankel*, 98 AD3d 444, 445 [1st Dept 2012] (reversing dismissal of plaintiffs' NYCHRL disability discrimination claims). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 N.Y.2d 83, 87-88; *see Vig*, 67 AD3d 140, 144-45.

Defendants' motion burden to demonstrate that a complaint states no legally cognizable cause of action is heavy, and arguments on the merits of the claims are improper. *Leon*, 84 N.Y.2d 83, 87-88 ("the burden is placed upon one who attacks a pleading for deficiencies in its allegations"); Siegel, N.Y. Prac. § 265 [6th ed.] ("in order to succeed on the motion, the defendant must convince the court that nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim"). "A motion to dismiss merely addresses

the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. Therefore, whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is *not relevant* on a pre-discovery motion to dismiss." *Kaplan*, 142 AD3d 1050, 1051 (emphasis added).

C. More Relaxed Standards Apply To Employment Discrimination Pleadings

For the past decade, and since the landmark case of *Vig*, NYCHRL discrimination pleadings in the First Department have been governed under an even lower and "particularly relaxed" notice pleading standard whereby a plaintiff "need not plead specific facts." *Vig*, 67 AD3d 140, 144-145 (emphasis added). In *Vig*, the Appellate Division rejected the lower Court's holding that "conclusory allegations" and "speculation" were a proper basis for a CPLR 3211[a][7] motion under the NYCHRL. *Vig,* 67 AD3d 140, 144; *see, also, Phillips v City of NY*, 66 AD3d 170, 189 n 26 [1st Dept 2009] (NYCHRL discrimination pleading states cause of action with conclusory allegations), *overruled on other grounds by Jacobsen v NYC Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]. Courts have cited *Vig* at least 100 times.[19]

"*Vig* remains the governing law in this department as to the relaxed 'notice pleading' standards in employment discrimination claims." *Krause v. Lancer & Loader Group, LLC*, 40 Misc.3d 385, 965 NYS2d 312 at n.5 [Sup. Ct, N.Y. County 2013]. This is so even as Federal pleading "became far more demanding than those in New York State courts after a pair of recent

[19] *See also Stoica v. Phipps*, 2018 N.Y. Misc. LEXIS 2979, 2018 NY Slip Op 31592[U], *1 [Sup. Court, N.Y. County 2018] (citing *Vig*); *Baldwin v. Bank of Am.*, 984 NYS2d 630, 42 Misc.3d 1203[a] [Sup. Court, N.Y. County 2013] (citing *Vig* and denying defendant's motion to dismiss in action under NYCHRL); *Artis*, 34 Misc. 3d 858, 861 (citing *Vig* and holding that plaintiff gave defendant "fair notice" of various claims under NYCHRL); *see also Schindler v Plaza Constr. LLC*, 2017 N.Y. Misc. LEXIS 92, 2017 NY Slip Op 30029[U], *8 [Sup. Ct, N.Y. County 2017], *aff'd* 154 AD3d 495 (1st Dep't 2017) (citing *Vig* and holding that, "the plaintiff need not allege specific facts, 'but need only give fair notice of the nature of the claim and its grounds'") (citation omitted).

United States Supreme Court decisions." Siegel, N.Y. Prac. § 265 [6th ed.]. *Vig*'s relaxed notice pleading standard applies broadly to NYCHRL pleadings, including allegations as to liable parties. *See Baldwin*, 42 Misc.3d 1203[A] at *7 ("[a]lthough this relaxed pleading standard is most often applied to the viability of a claim as a cause of action, it has been applied as well to allegations as to the persons who are liable").

Vig and its progeny are consistent with cases recognizing the challenges of employment cases. *Bennett*, 92 AD3d 29, 37 n.7, *codified at* NYC Admin. Code § 8-130[c] (easing summary judgment standard for employment plaintiffs, stating "direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier. Specific intent will only rarely be demonstrated by 'smoking gun' proof.") (citation omitted).[20]

D. The CPLR Accommodates The NYCHRL's Plaintiff-Favorable Approach

The broad and liberal NYCHRL protections have shaped the Courts' application of the CPLR in NYCHRL actions. For example, *Williams* and *Bennett* (both now codified at NYC Admin Code § 8-130) significantly loosened application of CPLR 3212 to accommodate the lower standard for proving NYCHRL claims. *Bennett* cautions against using the CPLR to "depriv[e] an alleged victim of discrimination of a full and fair hearing before a jury of her peers" by "ratchet[ing] down or devaluing the means by which those intended to be protected by the City HRL could be most strongly protected." 92 AD3d 29, 44; *see also Romanello v. Intesa*

[20] *See also Pludeman v. N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] ("where concrete facts 'are peculiarly within the knowledge of the party' charged with the [wrong] it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings"); *Zubulake v. UBS Warburg LLC*, 382 F Supp 2d 536, 544 [SD NY 2005] (allowing plaintiff to introduce evidence of discrimination against non-plaintiff employees as probative of employer motivation to discriminate).

Sanpaolo, S.p.A., 22 NY3d 881, 885 [2013] (Abdus-Salaam, J., concurring in part) ("Plaintiff clearly satisfied the liberal pleading requirements set forth in the City Human Rights Law"). This approach is consistent with liberal construction of the CPLR. *See* CPLR 104 (the CPLR "shall be liberally construed to secure the just [] determination of every civil judicial proceeding.").

III. PLAINTIFFS STATE A CAUSE OF ACTION FOR GENDER DISCRIMINATION

Applying the above standards, Plaintiffs clearly state a cause of action for discrimination based on gender/sex in violation of the NYCHRL. Plaintiffs allege numerous, specific instances of sexual touching, sexual comments and sexual advances. Plaintiffs also allege, among other items, that "Defendants treated Plaintiffs less well, differently, and less favorably, than other employees and employees outside their protected classes, and subjected them to discrimination, harassment and retaliation not perpetrated against other employees and employees outside their protected classes." (Compl. ¶¶ 62-68, 119, 125 136); Plaintiffs' Affidavits, Point A; SOF § C). In accordance with the Appellate Division *Schindler*, *Kassapian*, *Kaplan* and *Vig* precedent and opinions *Martin* and *Pryor*, *supra*, and other cases, Plaintiffs clearly state a cause of action. While Defendants argue that Plaintiffs fail to plead a claim for discrimination (*see* Def. Br. 1, 4-6), Defendants' arguments are baseless.

A. Defendants Mis-State The Law

Defendants baldly and inexcusably present to the Court completely inapt standards by mis-stating summary judgment and Federal pleading caselaw and ignoring the proper standard governing Plaintiffs' NYCHRL pleadings under the CPLR.

First, Defendants inappropriately rely on inapplicable Federal pleading standards, (*see* Def. Br. 4), which more than a decade ago "became far more demanding than those in New York

State courts." Siegel, N.Y. Prac. § 265 [6th ed.]. Plaintiffs' pleadings are covered by the far more liberal CPLR pleading standards applicable to NYCHRL claims. (*See* Argument, Point II). Defendants' reliance on Federal pleading standards misleads the Court and warrants denial of Defendants' motion.

Second, Defendants *confuse* the different standards for motions to dismiss and for summary judgment and even *mis-apply* summary judgment cases including *Russo v. New York Presbyterian Hosp.*, 972 F Supp 2d 429, 451 [ED NY 2013] and *Williams*. Defendants *falsely* argue that *Russo* held that at the pleading stage "when *alleging* sexual harassment 'a plaintiff must still establish that she suffered a hostile work environment...."' (Def. Br. 5) (emphasis supplied). Defendants *falsely* argue that *Williams* held that "a complaint must *allege* facts *demonstrating* that the plaintiff 'has been treated less well than other employees because of her gender.'" (Def. Br. 4) (emphasis supplied). Defendants are wrong. *Russo* and *Williams* contain no such mandates as to *pleading allegations*, but instead address issues of evidence on a post-Answer motion for *summary judgment*.[21]

Defendants' misrepresentation of *Williams* is particularly egregious. *Williams,* addressing CPLR 3212, and *Vig,* addressing CPLR 3211, are companion cases at the center of New York employment law practice—both issued the same year and both penned by Justice Acosta (now the Presiding Judge). Defendants completely mischaracterize *Williams* and ignore *Vig.* As to Defendants' *motion to dismiss*, Plaintiffs need not "establish" or "demonstrate" anything in their

[21] The full context of Defendants' quotation from *Williams* is: "For HRL *liability*, therefore, the primary issue *for a trier of fact* in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender." 61 AD3d 62, 78 (emphasis supplied).

pleadings, and "need not plead specific facts." *Vig*, 67 AD3d 140, 145. Plaintiffs need only provide *notice* in the Complaint and did so, consistent with CPLR 3013/3026 as modified by *Vig*'s particularly relaxed standard. *See Kaplan*, 142 AD3d 1050, 1051 ("whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss."). (*See* Argument, Point II).

Third, Defendants completely ignore the 2016 amendments to the § 8-130 of the NYCHRL. (*See* Argument, Point I.A, B). The 2016 Amendment Report clearly states the rationale for amendment: "Some courts have recognized and followed [the NYCHRL's maximally liberal] vision, but others have not, and many areas of the law remain as they were [] because they have not been scrutinized to determine whether they are consistent with the uniquely broad requirements of the HRL." 2016 Amendment Report, 8 (Goldberg Aff., Exh. B). Here, Defendants *improperly rely* on pre-Amendment cases and *completely ignore* the liberal construction expressly mandated by NYCHRL § 8-130. As a result, Defendants wholly fail to meet their burden and their motion should be denied.

B. Defendants' Gender-Based Treatment Argument Is Baseless

Third, Defendants falsely argue that, "The Complaint does not plead facts establishing that Rose or CRI treated [Plaintiffs] less well than other employees based upon their gender" and that "Plaintiffs do not allege a single 'term[],' 'condition[]' or 'privilege[] of employment' that Plaintiffs were deprived of on the basis of gender." (Def. Br. 1, 5).

In addition to the inapt standard Defendants seek to apply (*see* Point III.A. above), Defendants' "terms and conditions" argument is without merit. Plaintiffs clearly allege numerous and repeated incidents of sexual touching, sexual comments and other inappropriate behavior,

and that Plaintiffs were treated "less well" than persons outside their protected class because of gender and sex. (Compl. ¶¶ 62-68, 119, 125, 136; Plaintiffs' Affidavits, Point A; SOF § C). These are precisely the type of allegations that state a cause of action under NYCHRL § 8-107[1] regarding "terms and conditions." (*See* cases cited at p. 4 and Argument, Point I.A, B). Sexual touching, comments and behavior adversely impact terms and conditions of employment in violation of the NYCHRL. *This is expressly stated in both the NYCHRL statutory text and the caselaw. See* NYC Admin Code § 8-101 ("gender-based harassment threatens the terms, conditions and privileges of employment"); *Williams*, 61 AD3d 62, 76 (workers subject to less-well treatment based on sex, including those subject to gender-based behavior that is not severe or pervasive, "*do not have* the same terms and conditions of employment" as those working "free of unwanted gender-based conduct") (emphasis supplied); (*see* cases cited at p. 4 and Argument, Point I.A- B).

Defendants' "on the basis of gender" argument is frivolous, misleading and defies common sense. Indeed, when made elsewhere, that argument has been flatly rejected. *Batten*, 2018 US Dist LEXIS 105327, at *15, n 2 [Nina Gershon, D.J.] ("Defendants also argue that there is no evidence that Keyes's 'hug' was motivated by plaintiff's sex. This argument does not merit serious discussion."); *Pryor*, 992 F Supp 2d 252, 261 [Katherine Polk Failla, D.J.] (denying motion to dismiss, stating, "Any reasonable observer, if asked what motivated this encounter, would almost certainly answer that the male supervisor's actions were prompted by the female employee's gender, not by her interest in collecting stamps or her affection for a particular sports team.").

According Plaintiffs the benefit of every possible favorable inference from the allegations

in the Complaint, Rose's unwelcome verbal conduct and sexual touching objectified Plaintiffs as women and signaled that Defendants considered it appropriate to foster an office environment that degraded women; Rose's conduct shows that he took a perverse pleasure in sexually harassing, demeaning and embarrassing female employees, including Plaintiffs. *Hernandez*, 103 AD3d 106, 115. Plaintiffs state a cause of action and Defendants' motion should be denied.

C. Defendants' "Conclusory Statements" Argument Is Baseless

Fourth, Defendants argue that Plaintiffs' allegations of "sexual touching," "sexual comments," and "sexual advances" are "conclusory" and "do not suffice." (Def. Br. 5-6). Defendants' argument is contrary to *Vig*, which reversed an erroneous dismissal made on the basis that plaintiff offered "only conclusory allegations." 67 AD3d 140, 144-45. Plaintiffs have alleged among other items that the touching, comments and advances—"in particular Mr. Rose's"—were "sexual" and "unwelcome and offensive" and provided specific examples. (*See, e.g.*, Compl. ¶¶ 62-68, 119, 125; Plaintiffs' Affidavits, Point A; SOF § C). As stated by the Appellate Division, First Department as recently as 2018, "sexual harassment under the City HRL involves unwelcome verbal or physical conduct of a sexual nature." *Suri v Grey Global Group, Inc.*, 164 AD3d 108, 113 [1st Dept 2018]. Plaintiffs' allegations of unwelcome physical touching in a sexual manner, taken together and with all favorable inferences, are sufficient to give fair notice of their claims. Plaintiffs have more than satisfied their *de minimis* pleading burden under *Vig* and have given Defendants fair notice of the transactions and occurrences underlying their gender discrimination/retaliation causes of action and the material elements of their claims. (*See* cases cited at p. 4; Argument, Point I.A- B). Defendants do not allege, and have failed to show, that they are prejudiced by the Complaint. *Catli*, 40 AD2d 714, 715

(pleading "defects shall be ignored if a substantial right of a party is not prejudiced.") (citation omitted); CPLR 3013; CPLR 3026. Even Defendants' baseless arguments reflect that they understand the claims.

D. Defendants' "Routine Workplace Interaction" Argument Is Baseless

Fifth, Rose argues that "[t]he Complaint attempts to seize upon routine workplace interactions and banter and spin them into actionable conduct by omitting the context and tone and using suggestive language (*i.e.*, 'sexually')." (Def. Br. 6). Defendants' argument is baseless. Rose's conduct, as alleged in the Complaint, falls well within the scope of "less-well" gender-based treatment/retaliation prohibited by the NYCHRL. Plaintiffs alleged facts sufficient to give Defendants fair notice, and Defendants have not been prejudiced. (SOF, cases cited at p. 4 and Argument, Point I.A- B). Defendants' argument is contrary to the NYCHRL: "Routine" harassment gives rise to liability. *Williams*, 61 AD3d 62, 76. If Rose is instead arguing that his harassment was merely "petty slights or trivial inconvenience," his argument is improper on a motion to dismiss. "A contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense [], which should be raised in the defendants' answer and does not lend itself to a pre-answer motion to dismiss." *Kassapian*, 155 AD3d 851, 853.

E. Defendants' Discriminatory Discharge Argument Is Baseless

Sixth, Defendants argue that Plaintiffs Harris and McNeal have not alleged their employment was terminated because of their gender. (Def. Br. 5). That argument is baseless. Plaintiffs allege, among other items, unlawful termination of employment. (Compl. ¶¶ 91, 125, 136). Drawing all inferences in Plaintiffs' favor, as *Leon* mandates, Defendants fail to meet their burden to prove that they failed to receive fair notice of Plaintiffs' causes of action. *See*

Pludeman, 10 NY3d 486, 493 (rejecting CPLR 3211[a][7] motion to dismiss, stating "Lest we willfully ignore the obvious—or the strong suspicion of a [wrong]—we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged [wrong]").

In this light, for example, an inference that Defendants discharged employees including Plaintiffs Harris and McNeal simply to avoid compliance with the NYCHRL is warranted, and certainly would be discharge "because of gender." *See*, *e.g., Griffin v. School Bd. of Prince Edward Cty.*, 377 US 218, 225 (1964) (county unlawfully closed its public schools rather than comply with order to desegregate). Defendants' self-serving factual excuses for terminating Plaintiffs' employment, including without limitation the alleged closure of Rose's company (*see* Def. Br. 5, n. 2) are improper, because "[a] motion to dismiss merely addresses the adequacy of the pleading," not the substantive cause of action. *Kaplan*, 142 AD3d 1050, 1052.[22]

Under the applicable standards, the Complaint's factual allegations, from which all possible inferences must be drawn in Plaintiffs' favor, are more than sufficient to state a cause of action.

F. Defendants' Argument That Wei Was A Non-Employee Is Baseless

Defendants argue that (a) Plaintiff Wei was not their W-2 employee and (b) they did not take adverse employment action against her. (Def. Br. 5). Defendants' arguments are baseless. Defendants can be held liable on multiple grounds for unlawful conduct against Ms. Wei.

Charlie Rose can be held liable for unlawful conduct committed as an "employee" of CBS. *See* NYC Admin Code § 8-107[1][a]. Defendants can also be held liable, as a variety of

[22] Notably, according to public records, Rose's company remains legally "active." (Goldberg Aff. Exh. E).

"employer," including "joint employer" or constructive employer. (*See* Compl. ¶¶ 17, 134). It is improper for Defendants to argue on their motion that they cannot be held liable as a non-traditional employer. *Schindler*, 2017 N.Y. Misc. LEXIS 92 at *10 ("as determination of joint employer status fact-intensive inquiry, 'based on the circumstances of the whole activity, viewed in light of economic reality,' dismissal premature absent discovery") (citation omitted), *aff'd* 154 AD3d 495. Defendants can also be held liable for aiding and abetting unlawful discrimination/retaliation against Ms. Wei or attempting to do so. NYC Admin Code § 8-107[6]; *Schindler*, 154 AD3d 495, 496; *Baldwin*, 42 Misc.3d 1203[A] at *15-20.

Defendants' argument that no "adverse action" was taken against Ms. Wei has no merit - she properly pleads adverse action including among other items negative treatment, abuse and treating her less well in retaliation for her protected activity. (*See* SOF; Plaintiffs' Affidavits).

IV. PLAINTIFFS STATE A CAUSE OF ACTION FOR RETALIATION

Under the NYCHRL, unlawful retaliation is an "unlawful discriminatory practice" and includes any act that is "reasonably likely to deter a person from engaging in protected activity." NYC Admin Code § 8-107[7]. Retaliation includes, not only termination, but also includes without limitation, continued harassment, verbal abuse, unjustified criticisms of job performance, and threats of termination. (Argument, Point I.C). Applying the correct pleading standards, Plaintiffs met or exceeded the standards for stating a cause of action for retaliation. Plaintiffs gave fair notice to Defendants of their retaliation claims. Plaintiffs allege that they engaged in protected activity and suffered unlawful retaliation, including without limitation intimidation, verbal abuse, unjustified criticisms of job performance, threats of termination, and/or termination. (Compl. ¶¶ 67-77, Count Two; Plaintiffs' Affidavits, Points, B, C; SOF §§ D, E).

Defendants' argument that Plaintiffs Harris and McNeal failed to plead their protected activity is baseless. (Def. Br. 7-8). Defendants received fair notice that Plaintiffs "made clear" their disapproval of Defendants' conduct by communicating to Defendants in substance that Defendants' treatment of them was wrong, and that Defendants knew or should have known that such communication was opposition. *Albunio*, 16 NY3d 472, 479; (Compl. ¶¶ 67-77 and Count Two; Plaintiffs' Affidavits, Points, B, C; SOF §§ D, E).

Defendants' argument that Plaintiffs Harris and McNeal failed to plead retaliatory conduct is baseless. (Def. Br. 8). Defendants unlawfully retaliated against Plaintiffs by, among other items, continued harassment, verbal abuse, unjustified criticisms of job performance, and threats of termination, all of which are actionable retaliation. *Williams*, 61 AD3d 62, 71; *Artis*, 34 Misc.3d 858, 486-7. The retaliation was also close in time to the protected activity. (Plaintiffs' Affidavits, Points B, C). Defendants also terminated Plaintiffs Harris and McNeal and Defendants' motive for doing so is a matter for the jury at trial, not an issue for a pre-Answer CPLR 3211 motion to dismiss. (Compl. ¶¶ 78-94; SOF § F; *see* Argument, Point III.E).

Defendants' challenge to Ms. Wei's allegations at Compl. ¶¶ 69-71, 95, is baseless. (Def. Br. 8). Ms. Wei engaged in protected activity and Defendants unlawfully retaliated against Ms. Wei by, among other items, continued harassment, intimidation, verbal abuse, and unjustified criticisms of job performance, all of which were reasonably like to deter opposition and which were close in time to Wei's opposition. Defendants are liable on multiple grounds. (Argument, Point III.F; Plaintiffs' Affidavits, Points B, C; Compl. ¶¶ 17, 134).

Plaintiffs satisfied and, indeed, exceeded, their *de minimis* pleading burden.

V. PLAINTIFFS STATE A CAUSE OF ACTION FOR AIDING AND ABETTING

Plaintiffs state a cause of action for aiding and abetting under NYC Admin Code § 8107[6]. (Compl. ¶¶ 138, 146). Defendants argue the Complaint fails (a) to "specify" facts as to the identity of the defendants alleged to be aiders/abettors/attemptors and/or primary violators; and (b) to plead facts "establishing" that CRI or Rose "actually participated" or had "direct, purposeful participation" in NYCHRL unlawful discriminatory conduct. (Def. Br. 9). Defendants' arguments are without merit.

First, Plaintiffs meet or exceed the applicable pleading standards and Defendants have received fair notice of the claims for aiding and abetting liability under the relaxed notice pleading standard of *Vig*. In *Baldwin*, the Court rejected a similar challenge to a *de minimis* factual pleading of NYCHRL aiding and abetting, citing *Vig*: "Defendant points out the lack of allegations of specific facts, but does not cite any authority that they are necessary to a viable pleading, nor has the Court seen any. The allegations that do appear in the complaint do not suggest other facts that would preclude defendant Perez's liability." 42 Misc. 3d 1203[A], *7. Not only do Defendants ignore *Vig*, but Defendants also mislead the Court by falsely asserting that "Complaint must establish facts." (*See* Def. Br. 9).

Contrary to Defendants' misrepresentation, the Complaint need not "establish" anything. As the *Baldwin* Court stated: "Particularly in light of the relaxed pleading requirements in employment discrimination cases, Plaintiff's allegations are sufficient to withstand this motion to dismiss. Defendant may well test the legal and factual bases for his liability after appropriate discovery with a motion for summary judgment." *Baldwin*, 42 Misc. 3d 1203[A] at *8. Here, there has been no exchange of discovery. Defendants also rely on *Brice v. Sec. Operations Sys.,*

Inc., 2001 US Dist. LEXIS 1856 [SD NY Feb. 26, 2001], an inapt Federal summary judgment case that both pre-dates *Williams* and the 2016 amendments to the NYCHRL.

Second, the Complaint gives Defendants fair notice that they "condoned" and/or "acquiesced" in the unlawful acts of CBS and/or attempted to do so. (Compl. ¶¶ 17, 134). *See, e.g., Artis*, 34 Misc.3d 858, 868 ("plaintiff states a further claim [] for aiding and abetting by specifically alleging that Swiss Post Solutions employees Cary Richardson and Jeff Price excused and acquiesced in the racial and sexual harassment of plaintiff").

Giving Plaintiffs every possible favorable inference, as this Court must, Plaintiffs' allegations are more than sufficient to state a cause of action for aiding and abetting liability. (Compl. ¶¶ 40, 58-59, 68-69, 128). *See Pecile v. Titan Capital Grp*., 2018 N.Y. Misc. LEXIS 1669 *14; 2018 NY Slip Op 30831(U) [Sup. Court, NY County 2018] ("The fact that Sandra was not plaintiffs' employer does not foreclose these [NYCHRL aiding/abetting] claims").

CONCLUSION

For all of the above reasons, the Court should deny in its entirety Defendants' motion to dismiss.

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